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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID ANTHONY DAWSON, Defendant and Appellant.	C050569 (Super. Ct. No. 04F07104)

A jury convicted defendant David Anthony Dawson of attempted voluntary manslaughter as a lesser included offense of attempted murder (Pen. Code, §§ 187, subd. (a), 192, subd. (a), 664--count one; further undesignated statutory references are to the Penal Code), discharge of a firearm at an occupied motor vehicle (§ 246--count three), three counts of assault with a semiautomatic firearm (§ 245, subd. (d)--counts two, four & five), and sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)--count six). The jury found true allegations that defendant personally and intentionally used a firearm causing great bodily injury in counts one and three

(§ 12022.53, subd. (d)), personally inflicted great bodily injury in count two (§ 12022.7, subd. (a)), and used a firearm in counts two, four and five (§ 12022.5, subds. (a) & (d)).

Defendant was sentenced to state prison for 30 years to life, consisting of five years on count three (§ 246 [discharge of a firearm at an occupied vehicle]) plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). Concurrent terms were imposed on counts four, five, and six. Sentence on counts one and two was stayed pursuant to section 654.

Defendant contends the 25-years-to-life term for the firearm enhancement violates the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. We affirm the judgment.

FACTS AND PROCEEDINGS

On an evening in July 2004, defendant and Ben Lathrop, who had been selling marijuana together for about six months, left their residence and set out on a round of marijuana deliveries. Their driver was Amy Tarpley, who had come to their residence to obtain some Ecstasy pills from defendant and agreed to drive them after obtaining the pills. Defendant carried a loaded nine-millimeter handgun. He and Lathrop had each smoked about a quarter ounce of marijuana and were under its influence.

After a few deliveries, the group arrived outside the home of Shaun McMahon, intending to deliver two ounces of marijuana to a prospective buyer, Peter Douete. The sale had been

arranged by McMahon and Shane Scott. Lathrop handed a large bag to McMahon, and McMahon carried it across the street to deliver it to Douete, who was sitting in the driver's side of a Dodge Neon. Inside the Neon were passengers Remy Mack and Stephanie Tarpley, Amy's sister. Lathrop had received the marijuana on credit from his supplier, Daniel, who was to be paid after McMahon received the money from Douete.

Douete diverted McMahon's attention by requesting a scale. When McMahon stepped back from the Neon to inquire about a scale, Douete quickly drove off. Defendant got out of Amy Tarpley's car and fired 13 or 14 rounds at Douete's departing car. Defendant and Lathrop ran back to Amy's car and told her to hurry out of there.

Douete was treated at a local hospital for bullet wounds to his shoulder and buttocks and was transferred to another hospital the next day for further care. The rear window of the Neon was shattered, and several gunshots perforated the car.

Shortly after the shooting, Amy Tarpley realized that she recognized the Neon as belonging to Douete, the boyfriend of her sister, Stephanie Tarpley. Amy telephoned Stephanie, who confirmed that she had been in the car that defendant had fired into.

The next day, defendant admitted the shooting to his girlfriend, stating that someone had "robbed him and Ben."

The defense rested without presenting any evidence or testimony.

DISCUSSION

Defendant contends the 25-years-to-life term for the firearm enhancement violates the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. He asserted the Eighth Amendment contention unsuccessfully in the trial court. Neither contention has merit.

Section 12022.53, subdivision (d), provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

As can be seen, section 12022.53 contains a three-part gradation of enhancements for firearm use. Subdivision (b) provides a 10-year enhancement if a perpetrator personally uses a firearm in the commission of a felony listed in subdivision (a). Subdivision (c) provides a 20-year enhancement if a perpetrator personally and intentionally discharges a firearm in the commission of a listed felony. Subdivision (d) provides an enhancement of 25 years to life if a perpetrator personally and

intentionally discharges a firearm, causing great bodily injury, in the commission of a specified felony including section 246.

Defendant was convicted in count three of violation of section 246, maliciously and willfully discharging a firearm at an occupied motor vehicle, causing great bodily injury to Peter Douete, who was hospitalized for gunshot wounds to his shoulder and buttocks. Pursuant to section 12022.53, subdivision (d), defendant's sentence was enhanced by 25 years to life.

A punishment for a term of years violates the Eighth Amendment to the United States Constitution if it is an "extreme sentence[]" that is "'grossly disproportionate' to the crime." (*Ewing v. California* (2003) 538 U.S. 11, 23 [155 L.Ed.2d 108, 119] (*Ewing*) (plur. opn. of O'Connor, J.); *Lockyer v. Andrade* (2003) 538 U.S. 63, 72 [155 L.Ed.2d 144, 156]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 869] (conc. opn. of Kennedy, J.).) In a noncapital case, "'successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (*Ewing, supra*, at p. 21 [115 L.Ed.2d at p. 117].)

The United States Supreme Court has upheld application of California's three strikes law where a defendant was sentenced to a term of 25 years to life for shoplifting golf clubs worth approximately $1,200. (*Ewing, supra*, 538 U.S. at pp. 17-18, 30-31 [155 L.Ed.2d at pp. 114-115, 123].) In rejecting Ewing's cruel-and-unusual-punishment claim, the court explained that the Eighth Amendment contains a narrow "proportionality principle" applicable to noncapital sentences. However, the Eighth

Amendment does not require strict proportionality between crime and sentence, but only forbids extreme sentences that are grossly disproportionate to the crime. (*Id*. at p. 23 [115 L.Ed.2d at p. 118].)

The enhancement of 25 years to life that we consider here is not grossly disproportionate to defendant's act of discharging a firearm at the Neon causing great bodily injury. The act was far more serious and life threatening than the nonviolent shoplifting at issue in *Ewing.* Defendant's lack of a criminal history does little to mitigate the gravity of the offense. This is not the "'rare case'" that leads to an inference of disproportionality. (*Ewing, supra*, 538 U.S. at p. 30 [155 L.Ed.2d at p. 123].) Defendant's claim under the United States Constitution has no merit. (See *People v. Riva* (2003) 112 Cal.App.4th 981, 1003.)

A punishment violates the California Constitution if, "although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In making this determination, we: (1) examine the nature of the offense and the offender; (2) compare the punishment with that meted out for more serious crimes in California; and (3) compare the punishment with that given for the same offense in other jurisdictions. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825; *In re Lynch, supra*, 8 Cal.3d at pp. 425-427.) Defendant's argument is confined to the first two points.

When considering the nature of the offense and the offender, we evaluate the totality of the circumstances surrounding the commission of the current offense, including the defendant's motive, the manner of the commission of the crime, the extent of the defendant's involvement, the consequences of his acts, and his individual culpability, including factors such as age, prior criminality, personal characteristics, and state of mind. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

Defendant notes that he was 19 years old at the time of the offense, that he had no criminal history, and that the victim's wounds were "non-life-threatening." However, a defendant's youth and lack of criminal history can be substantially outweighed by the seriousness of the crime and the circumstances surrounding its commission. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17.)

Defendant, the sole shooter, responded to the loss of a baggie of marijuana by firing 13 or 14 rounds from a semiautomatic weapon at a fleeing car carrying three people on a residential street. His crime was ridiculously reckless and demonstrated an utter disregard for human life; including the lives of the people in the car and the lives of innocent bystanders who may have been on the street. Defendant knew that selling marijuana and drugs was illegal, that taking a loaded gun to a drug delivery was dangerous, and that shooting at an occupied, fleeing car promised dire consequences. Consideration of the offense and the offender does not suggest that defendant's sentence is disproportionate. (*In re Lynch, supra*,

8 Cal.3d at pp. 425-427; *People v. Cooper, supra,* 43 Cal.App.4th at p. 825.)

Regarding the punishment for more serious crimes in California, defendant argues that attempted voluntary manslaughter is more serious than shooting at an occupied vehicle, because manslaughter requires specific intent to kill but shooting at a car does not. Nevertheless, the shooting is punished more severely because manslaughter is not among the qualifying offenses listed in section 12022.53, subdivisions (a) or (d).

However, the "Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498.)

Thus, the greater punishment is based upon a special need to deter firearm offenses, rather than a determination that the mental state required for those offenses is especially culpable. It was no doubt conduct exactly such as this defendant's that the Legislature sought to deter--and if it could not deter in all cases, sought to punish severely as a deterrent to others--

when it enacted section 12022.53. Defendant's sentence is not disproportionate to his crime.

In any event, the facts of this case do not support defendant's argument that his intent in the attempted voluntary manslaughter was more culpable than his intent in shooting at the fleeing car. Defendant may have *intended* to kill Douete alone, but his intent to use a gun and to fire at a fleeing car threatened the lives of Douete, Mack, Stephanie Tarpley and any bystanders or residents who may have been in the car's path or the line of fire. Defendant's sentence of 30 years to life is not cruel or unusual within the meaning of the California Constitution. (*In re Lynch, supra,* 8 Cal.3d at p. 424.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

CANTIL-SAKAUYE, J.